IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1045

ARTHUR DWYER, *et al.*, *Petitioners*,

v.

CLIMATROL INDUSTRIES, INC., INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW) and its LOCAL 409, *Respondents*.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION FOR UAW AND ITS LOCAL 409

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The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) and its Local 409 [1], by counsel, respectfully pray that the Court *deny* the Petition for Writ of Certiorari.

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[1] Hereafter jointly "UAW," unless otherwise indicated.

OPINION BELOW

The opinion below, authored by Judge Hastings, is reported at 544 F. 2d 307 (7th Cir. 1976), *aff'm'g* 403 F. Supp. 683 (ED Wis. 1975).

QUESTION PRESENTED

An employer closes its plant during the term of a collective bargaining agreement. Does the Union breach its duty of fair representation by negotiating a closedown agreement which terminates the Pension Plan and distributes the assets in the manner specified in the Plan?

COUNTERSTATEMENT OF THE CASE

The Seventh Circuit's statement[2] is both succinct and accurate. For convenience, we reprint it:

> On December 1, 1970, Fedders Corporation . . . became the successor in interest of Climatrol and thereby bound by the March 1, 1970, collective bargaining agreements executed by Climatrol. Despite strong pressure from the defendant Unions, Fedders announced on June 29, 1971, its final decision to close its Milwaukee plant.
>
> As early as June 30, 1971, the defendant Unions began negotiating with Fedders on the impact of the plant closing. A Union proposed closedown agreement demanded increases in contractual benefits, and major increases in the area of pensions, insurance and severance. On October 8, 1971, Fedders refused to accept the tendered plan, and after a month's impasse, proposed a counteroffer, with actuarial figures and bids from insurance companies on annuity contracts. Upon mature consideration and recommendation of the elected

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[2] 544 F. 2d at 309. Reprinted in the Appendix to the Petition at App. 102-104.

> bargaining committee of Local 409, the UAW joined in accepting Fedders' proposed closedown agreement. The subject closedown agreement was duly executed December 15, 1971, by Local 409, the UAW and Fedders.
>
> Certain provisions of the pension plan agreement are critical to the determination of the subject matter of this litigation—the closedown agreement.
>
> Article XII of the pension plan agreement provides:
>
> > "Amendment and Duration of the Plan. 12.01 The Plan may be modified, altered or amended upon mutual agreement of the Company and the Union."
>
> Under Section 12.03, the pension plan agreement was to remain in full force and effect until March 1, 1973, when it would be proper subject matter for the next collective bargaining negotiations.
>
> Article V, Section 5.01 of the closedown agreement amended the terms of Section 9.01 of the pension plan agreement, as follows:
>
> > "9.01 The Company will contribute not later than February 15, 1972, $160,000 to the Trust Fund, and upon payment of such amount, the Company shall have no further funding obligation under the Plan."
>
> Fedders paid the $160,000 into the Trust Fund and considered its obligation under the pension plan fully satisfied. The defendant Unions agreed.

The closedown agreement did *not* alter the plan provisions governing benefits or allocation of the fund on termination:

> . . . Fedders and the defendant Unions in no way modified the provisions of Section 13.01 of

the pension plan, which section defines how funds in the Trust Fund of the plan should be allocated upon termination of the plan. The benefit provisions of the pension plan were not altered. The $160,000 additional contribution to the Trust Fund by Fedders was allocated in accordance with the preexisting allocation formula.

The Company was not delinquent in its pension contributions.[3] Despite the new $160,000, the assets in the

[3] There are two elements to an employer's annual contribution to a funded pension plan: normal cost, and a part of accrued (or "past-service") liability.

"Normal cost" is the amount of money which, according to an actuary, will fund the benefits due on retirement for work done for the employer in the last year.

"Past service liability" arises because, when a pension plan is started, employees are given credit for all their service with the employer, not just the years since the pension plan started. E.g., if a plan starts in 1950, an employee with 20 years of service may retire in 1951. Only one year (1950) of normal cost will be paid by 1951. Some 19 years of "past-service" remain to be funded. This "past service liability" is funded, *assuming* continuation of the plan, by amortizing it over a 30 year funding cycle. Such was the case here. The yearly contribution to the amortization of the past service liability (plus interest) is the second part of an employer's annual pension contribution.

However, an employer may go out of business before the 30 year amortization cycle has been completed. This happened here. What it does, the plan is not fully funded. Whatever money is in the fund is distributed to the beneficiaries in a priority order set out in the termination section of the plan, here Art. XIII § 13.01. Depending on the assets and actuarial calculations, the lower categories suffer benefit cuts—even though the employer has paid every cent, every year, under the pension plan agreement.

This result led Congress to pass the Employee Retirement Income Security Act of 1974 (ERISA), 29 USC § 1001 *et seq.* That law establishes the Pension Benefit Guaranty Corporation (PBGC) to reinsure pension benefits in the event of closings, 29 USC §§ 1301-1368, much as FDIC reinsures bank deposits. Unfortunately, the instant closing occurred before the effective date of ERISA, 29 USC § 1381.

fund were insufficient to provide full benefits for those in the lowest distribution priorities, including plaintiffs.

Plaintiffs sued, demanding that the Company fully fund the plan to the end of its 30 year funding cycle, *regardless* of the plant closing or the term of the pension plan agreement. The UAW, it is alleged breached its duty of fair representation in failing to bargain such future funding.

The Seventh Circuit affirmed the District Court's grant of summary judgment to defendants, holding: No vested property rights were infringed. As to funds previously contributed, the plan's existing allocation formula was followed: *Contrast: Hauser* v. *Farwell, Ozmun, Kirk & Co.,* 299 F. Supp. 387 (D Minn. 1969). The closedown agreement affected only *future* contributions, an area where the Unions have complete and sole authority to negotiate. § 9(a) of the National Labor Relations Act (NLRA), 29 USC § 159(a). There is no estoppel. The Union cannot be blamed for failing to secure a contract right which plaintiffs never had. And finally, plaintiffs failed to show "arbitrary, discriminatory, or bad faith conduct" by the UAW. *Vaca* v. *Sipes,* 386 U.S. 171, 190 (1967); *Motor Coach Employees* v. *Lockridge,* 403 U.S. 274, 299 (1971).

ARGUMENT

This case is, at best, of parochial concern, turning on the reading of a particular labor contract. Everyone concedes the employees had vested rights in funds previously contributed to the pension plan. The Union did not bargain away these rights. The employees received exactly the allocation of funds specified in the

plan. As to future contributions, Article XII allowed modification and amendment. The Union made the best deal it could, in difficult circumstances, obtaining an additional $160,000 for the plan.[4] Petitioners argue only that Article XII did not allow this, or, if it did, the UAW did not get enough. Issues of such small significance do not merit review.

Were there significant issues, review would be inappropriate for another reason. Since this plant closed, Congress enacted the Employee Retirement Income Security Act (ERISA) of 1974, 29 USC § 1001, *et seq.* Had this plant closed today, the Pension Benefit Guaranty Corporation (PBGC), a federal agency, would have insured the pension benefits under Title IV of ERISA, 29 USC § 1332. The issues in this case are of passing, rather than continuing interest.

The Seventh Circuit's decision rests on the construction of a single labor contract. Because of ERISA, similar problems are unlikely to occur again. There are no constitutional or statutory issues. Petitioners

[4] Petitioners cite *UAW* v. *H.K. Porter Co.*, —— F. Supp. —— (ED Mich. 1976), 93 LRRM 2917, *app. pndg.*, accusing the UAW of being disingenuous. In *H.K. Porter*, the Company contracted to " . . . provide for the pension under the Plan by funding the Plan with the . . . Trust." [§ 10, Funding, reprinted in App. 130] The UAW viewed this as an unrestricted promise to pay for the benefits and sued to enforce it. The District Court agreed. The Fedders plan, in contrast, contains the usual and—from the Company's view—more prudent language. Section 9.01 requires only yearly payments of normal cost, and past service funding on a 30 year schedule. Fedders made these yearly payments. There was no unrestricted promise, as in *H.K. Porter*. The moral of these two cases is simple. When a Company makes an unrestricted promise, the UAW will sue to enforce it. Where, as here, there is no such promise, the UAW does not bring meritless litigation. Instead, it bargains as best it can.

do not assert any conflict among the Circuits. Nor is there a conflict with the decisions of this Court.[5] Petitioners can suggest no real reason why this case merits review.

CONCLUSION

For the foregoing reasons, the Court should *deny* the Petition.

Respectfully submitted,

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February 28, 1977.

[5] In order to have a conflict with *Burley* v. *Elgin, J & E Ry. Co.*, 327 U.S. 661 (1946), petitioners must *first* have their vested rights infringed. Holding that, under the agreement, no vested rights were infringed, the Court below did not even reach *Burley*. The Seventh Circuit, with all the parties, concedes the holding in *Burley*—that a union cannot bargain away vested rights. 544 F. 2d at 310.